

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re: : 08-11153
LEXINGTON PRECISION CORP. : June 11, 2008
Debtor. : One Bowling Green
-----X New York, New York

TRANSCRIPT OF MOTION FOR ORDER TERMINATING
DEBTORS' EXCLUSIVITY
BEFORE THE HONORABLE MARTIN GLENN
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: CHRISTOPHER MARCUS, ESQ.
JOHN LUCAS, ESQ.
RICHARD KRASNOW, ESQ.
Weil, Gotshal and Manges
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For the Committee: PAUL SILVERSTEIN, ESQ.
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1 THE COURT: All right. We're here in Lexington
2 Precision Corp. under 08-11153. Counsel, please make your
3 appearances.

4 MR. SILVERSTEIN: Good afternoon, Your Honor. Paul
5 Silverstein, Andrews Kurth for the Committee. With me is
6 Jonathan Levine.

7 THE COURT: Thank you.

8 MR. MARCUS: Good afternoon, Your Honor. Christopher
9 Marcus, Weil, Gotshal and Manges for Lexington. With me at
10 counsel table, John Lucas and Richard Krasnow as well.

11 THE COURT: Thank you very much.

12 MR. MARCUS: I'll just quickly introduce Mr. Mike
13 Lubin and Warren Delano from Lexington who are here in the
14 courtroom as well.

15 THE COURT: Thank you.

16 MR. SILVERSTEIN: Your Honor, as an aside, Nicholas
17 Walsh is likewise in the courtroom as well.

18 THE COURT: All right. Mr. Silverstein, it's your
19 motion.

20 MR. SILVERSTEIN: Thank you, Your Honor.

21 Your Honor, this is the committee's -- first let me
22 say that I'm a bit under the weather so any crackle in my voice
23 has nothing to do with puberty. It's purely my voice.

24 Your Honor, this is the committee's motion for an
25 order terminating the debtors' exclusivity under Section

1 1121(d) of the Bankruptcy Code. There have been rather fulsome
2 briefings and affidavits on this matter, so I'll try to be
3 brief, Your Honor.

4 First, the statutory underpinnings. Section 1121 was
5 enacted, Your Honor, to cure or solve the imbalances of a
6 former bankruptcy act, specifically under former Chapter 11,
7 only the debtor had a right to file a claim. Under Chapter 10
8 where there was a mandatory reorganization trustee, any party
9 could file a claim.

10 In enacting Section 1121 Congress sought to provide
11 flexibility in the context of a new Bankruptcy Code that had as
12 its underpinning the fostering of consensual negotiations for a
13 consensual Chapter 11 plan. Negotiation is the core of a
14 Chapter 11.

15 In Public Service of New Hampshire, 99 BR 155,
16 Bankruptcy Judge Yacos articulated it well when the Court said
17 that a debtor earns or pays for continued exclusivity by
18 negotiating in good faith with the creditors. In other words,
19 according to Judge Sigmund in the Lehigh Valley case, given
20 bankruptcy's overarching all of consensual reorganization,
21 exclusivity is intended to promote the environment in which
22 consensual planning may be negotiated.

23 THE COURT: Did you pick up the phone and call Mr.
24 Marcus and Mr. Krasnow and say let's sit down and negotiate?

25 MR. SILVERSTEIN: After 18 months --

1 THE COURT: No, just since the filing of the petition
2 have you picked up the phone and called Mr. Marcus and Mr.
3 Krasnow and said on behalf of the committee -- since you've
4 been retained on behalf of the committee, not for your ad hoc
5 committee. Since you're counsel for the committee have you
6 picked up the phone and called and said let's sit down and
7 start negotiating?

8 MR. SILVERSTEIN: I patiently waited for them to call
9 us, Your Honor.

10 THE COURT: That wasn't my question.

11 MR. SILVERSTEIN: No, I have not because under the
12 circumstances, Your Honor, it made absolutely no sense because
13 basically what we have before us in terms of the dynamic --

14 THE COURT: You know, when I was practicing law, Mr.
15 Silverstein, I used to find that the phone was right there on
16 my desk and I could pick it up and there wasn't a set of rules
17 that said they've got to call me before I call them.

18 MR. SILVERSTEIN: It's not a question of standing on
19 ceremony, it's a question of the history of these cases and the
20 history of the last 18 months because basically to sort of get
21 to the end, Your Honor, what has basically happened is that
22 management said to the pre-petition committee either take this
23 deal or we'll ram this deal down your throat in a Chapter 11.
24 And on that note, there's no reason for me --

25 THE COURT: You know, I'll be quite candid, I don't

1 find -- you know, the affidavits that you submitted with the
2 affidavit of your initial filing and with your reply which
3 focused almost exclusively, not entirely, almost exclusively on
4 the pre-petition period, I don't find it particularly
5 persuasive as to the issue of terminating exclusivity once this
6 case started.

7 MR. SILVERSTEIN: Your Honor, we understand the plan
8 that the debtor will propose because the debtor told us pre-
9 petition what plan they would propose, and therefore, there's
10 been no activity in terms of plan negotiations by the debtor
11 whatsoever. The debtor has an obligation to negotiate with
12 creditors.

13 THE COURT: On what day after the filing of a case
14 are they supposed to pick up the phone and call you and say
15 it's time to start negotiating?

16 MR. SILVERSTEIN: Well, they're supposed to pick up
17 the phone when either the committee's appointed or when the
18 committee's first set of professionals, specifically counsel,
19 is retained to say okay -- at least that's what I've done 25
20 years of practicing in this arena. You call up the committee
21 and you say it's time to start exchanging, for us to give you
22 the following information and let's try to streamline the
23 process, let's try to get whatever data we need to have back
24 and forth and let's sit down and start this case in earnest.
25 That has never happened.

1 THE COURT: You and Mr. Marcus have been in Court
2 together at prior hearings in this case. Did you turn around
3 to Mr. Marcus and say on behalf of the committee we want to sit
4 down with you next week, two weeks? Have you sent him a letter
5 saying we have the specific information requests?

6 MR. SILVERSTEIN: Yes.

7 THE COURT: What response have you gotten?

8 MR. SILVERSTEIN: The initial letter or the initial
9 e-mail was to Mr. Krasnow and I said to Mr. Krasnow, "Are you
10 involved in the flow of information with SRR, the committee's
11 financial advisor? Because it's not flowing too well, Mr.
12 Krasnow." He said he would get back. One of my litigators has
13 been in communication with one of Mr. Krasnow's litigators on
14 that subject and, you know, it's not going extremely well, but
15 apparently [unintelligible] but it's slow. SRR was retained on
16 May 13th. It is now June 11th. It's been a very slow and
17 painful -- well, let me rephrase it. It's not been that
18 painful but it's been a very slow struggle to get the
19 information. And that was one of the things that I think we
20 pointed out in the Walsh affidavit. The Walsh affidavit is,
21 even as an example, the initial indications of interest that
22 the debtors claim that they got from various prospective
23 buyers.

24 THE COURT: You're focusing on --

25 MR. SILVERSTEIN: We haven't even seen those.

1 THE COURT: You're focusing on the pre-petition
2 period again; correct?

3 MR. SILVERSTEIN: I'm focusing on both because to me,
4 Your Honor, the difference between the pre-petition period,
5 it's sort of a continuation, Your Honor. We view this
6 restructure as having commenced approximately more than 18
7 months ago. There was significant negotiations and frankly,
8 the holders of the 12 percent notes bent over backwards to
9 avoid a filing, bent over backwards to accommodate the debtors
10 and bent over backwards to see if there was a way consensually
11 to resolve this matter out of Court. My constituency has bent
12 over backwards to negotiate. My constituency has bent over
13 backwards to meet and try to reach a consensual --

14 THE COURT: But you didn't bend over forwards and
15 pick up a phone on your desk and call Mr. Krasnow and Mr.
16 Marcus.

17 MR. SILVERSTEIN: No, because that would have been
18 inappropriate under the circumstances, Your Honor.

19 THE COURT: It would?

20 MR. SILVERSTEIN: Yes.

21 THE COURT: How's that?

22 MR. SILVERSTEIN: Because of the history of this
23 case, Your Honor. It would have been extremely inappropriate
24 and frankly we were hoping, and that hope did not come to
25 fruition, we were hoping that there would be some semblance of

1 recognition by the debtors' management of their fiduciary
2 duties in Chapter 11 and that never came to pass.

3 THE COURT: How have they breached the fiduciary duty
4 in Chapter 11? Let's not talk about the pre-petition period.

5 MR. SILVERSTEIN: Well, they take the position that
6 they're not fiduciaries to creditors.

7 THE COURT: You attach a letter that was written in a
8 pre-petition exchange.

9 MR. SILVERSTEIN: Right.

10 THE COURT: What is it that they have -- I didn't see
11 anything in the Walsh or Welsh affidavits that showed that the
12 debtor or its professionals said that they don't owe a
13 fiduciary duty to the estate once the Chapter 11 petition was
14 filed. Is there something I missed?

15 MR. SILVERSTEIN: Yeah. I think what you missed is
16 that --

17 THE COURT: Where is that?

18 MR. SILVERSTEIN: -- they said in their papers that
19 they don't owe fiduciary duties to the creditors. They didn't
20 say they don't --

21 THE COURT: No, point to me where in the post
22 petition period that the debtors, the debtor in possession, or
23 its professionals have said they do not owe a fiduciary duty to
24 the estate.

25 MR. SILVERSTEIN: They didn't use the word estate.

1 They said they don't owe it to creditors.

2 THE COURT: Just show me where that is.

3 MR. SILVERSTEIN: I believe it's in the brief, Your
4 Honor. I believe it is all over their brief when they say that
5 they're solvent and therefore, because they're solvent, there
6 are no fiduciary duties owing to creditors. I can pull it out.

7 THE COURT: Yes. Go ahead. Show me where they say
8 it. I mean solvent or not, once they're in this Chapter 11
9 proceeding, the Bankruptcy Code and case law imposes certain
10 fiduciary obligations on the debtor in possession and on its
11 professionals. Where have they disputed that they -- well, you
12 say they say they don't owe any fiduciary duty?

13 MR. SILVERSTEIN: To creditors.

14 THE COURT: Show me.

15 MR. SILVERSTEIN: Your Honor, I'm looking at their
16 brief at this moment to point that. Your Honor, Paragraph 2 of
17 the debtor's brief that says, quote --

18 THE COURT: Just give me a second and I'll find it.

19 MR. SILVERSTEIN: [Unintelligible] in Paragraph 2. I
20 can quote it if you'd like.

21 THE COURT: Go ahead.

22 MR. SILVERSTEIN: It says --

23 THE COURT: Is this the official committee of
24 unsecured creditors motion for order terminating those
25 specific? Is that what you're looking at?

1 MR. SILVERSTEIN: No. It's the debtor's objection to
2 the committee's --

3 THE COURT: The debtor's objection.

4 MR. SILVERSTEIN: Yes.

5 THE COURT: Okay. Just a second.

6 MR. SILVERSTEIN: It says, and I quote, first --

7 THE COURT: Hold on, hold on.

8 MR. SILVERSTEIN: Sure. Certainly.

9 THE COURT: Go ahead.

10 MR. SILVERSTEIN: It says, quote, "First, governing
11 case law makes crystal clear that the debtor's management does
12 not owe fiduciary duties to creditors," end quote. They didn't
13 say did not pre-petition owe fiduciary duties. They said does
14 not owe fiduciary duties to creditors. Your Honor, based on
15 that statement, it's not a statement talking about the past,
16 it's a statement talking about today. And based on their
17 papers, we believe that the debtors are of the position that
18 they do not -- that the debtor does not owe fiduciary duties to
19 creditors which we think is contrary to the law, and it's
20 contrary to the law that we have cited in our cases. I think
21 the debtor would say that they owe fiduciary duties to the
22 estate, but the debtor makes a distinction between all the
23 fiduciary duties to the estate and fiduciary duties to
24 creditors.

25 THE COURT: All right. So show me the case law that

1 says they owe the fiduciary duty to the creditors as opposed
2 to -- I mean I'm familiar with cases, I've written on the
3 subject --

4 MR. SILVERSTEIN: I'm aware of that.

5 THE COURT: -- about them owing a fiduciary duty to
6 the estate. But where -- give me a case that says they owe a
7 fiduciary duty to creditors.

8 MR. SILVERSTEIN: That would be specifically in our
9 reply to the brief on Page 6. We cited Ionosphere, 113 BR 164;
10 Centennial Textiles, 227 BR 606; Bowman, 181 BR 836, and the
11 cases cited therein.

12 THE COURT: Okay.

13 MR. SILVERSTEIN: Frankly, you know, as to -- again,
14 my [unintelligible], I apologize [unintelligible]. The --

15 THE COURT: I always interrupt.

16 MR. SILVERSTEIN: As do --

17 THE COURT: It's hard to get an argument out, Mr.
18 Silverstein, without me interrupting, so get used to it.

19 MR. SILVERSTEIN: It's okay. We have something in
20 common in that respect.

21 THE COURT: The difference is that you've got to stop
22 when I --

23 MR. SILVERSTEIN: You're the judge and what you say
24 is the law. I understand that, Your Honor. As to their -- how
25 about if I back up and go back [unintelligible] Your Honor.

1 THE COURT: Okay.

2 MR. SILVERSTEIN: Thank you. Many Courts, Your
3 Honor, have attempted to look to delineate factors by which
4 cause exists or doesn't exist. The Court's inquiry is very
5 fact specific that exclusivity is typically not terminated in
6 the first 120 days of the case. It does not mean that
7 exclusivity can't be terminated in the first 120 days of the
8 case. It's very fact specific.

9 The facts here, as we submit, suggest, Your Honor,
10 that it should be terminated. The debtors are not, in the
11 words of Judge Yacos, paying for continued exclusivity because
12 they are not negotiating. Despite Your Honor's comments that I
13 should have called them which --

14 THE COURT: No, I'm not saying you should have but
15 there was nothing that stopped you from --

16 MR. SILVERSTEIN: There was nothing --

17 THE COURT: For you to come in here and say terminate
18 exclusivity because they haven't negotiated with us, I
19 understand what your affidavit showed with respect to pre-
20 petition subject to interpretation. I don't want to get into
21 that. But in the post petition period, okay, I've got
22 questions for Mr. Marcus or Mr. Krasnow, whoever is going to
23 argue it, about why haven't you picked up the phone and called
24 Mr. Silverstein? They'll get those questions too.

25 MR. SILVERSTEIN: I appreciate that.

1 THE COURT: But there's nothing that stopped you from
2 picking up the phone. You're the one who's moved to terminate
3 exclusivity you say because they haven't negotiated, but you
4 never tried. You know, you might have a stronger position if
5 you said I wrote at least six letters, I called them three
6 times. When we left Court on such and such date I said to them
7 we want to sit down with you now. We don't want to do it two
8 months from now. We want to do it now. But that's not your
9 showing.

10 MR. SILVERSTEIN: Again, Your Honor, the reason we
11 didn't do that was because the debtors' management made it
12 very, very clear to the 12% note holders who hold the bulk of
13 the single class --

14 THE COURT: Well, if you didn't have the burden --
15 you do have, you acknowledged the other day, obviously you have
16 the burden on a motion to terminate. Now, this is not the
17 debtors' motion to extend exclusivity. Then the question would
18 be well, what have you done until now? Why haven't you picked
19 up the phone and called Mr. Silverstein? Why haven't you done
20 anything to engage them in discussion? But we're not that. I
21 mean --

22 MR. SILVERSTEIN: I clearly --

23 THE COURT: I viewed your -- you know, when I first
24 read your motion I viewed this, you know, oh give me a break,
25 this is a stalking horse. You know, they want to file this now

1 so if the debtor comes and seeks to extend exclusivity they're
2 going to say oh, but we told you back then.

3 MR. SILVERSTEIN: Yes, and that wasn't the purpose,
4 Your Honor. The purpose was exactly what we said. The purpose
5 was that we've spent 18 months in what we view as as
6 fundamentally a bad faith exercise by management. I
7 understand, Your Honor, why management wants to keep a company
8 that they formed, you know, 20, 30, whatever years ago. Okay.
9 This is their baby. I understand that. The problem is they're
10 insolvent, and they're insolvent under the Castro equity test
11 which we've cited in our papers. It's not just a balancing
12 test because we don't have to get to the balancing test today.

13 THE COURT: Sounds like some day we're going to have
14 an interesting evaluation hearing. It's not today.

15 MR. SILVERSTEIN: At some point we will.

16 THE COURT: It's not today.

17 MR. SILVERSTEIN: It's not today. It's not today but
18 on a cash flow [unintelligible] test there's no question under
19 applicable case law that we cited --

20 THE COURT: That doesn't say -- you know, they may be
21 insolvent, and therefore, they belong in a chapter proceeding.
22 It doesn't mean there's value in the equity. You can have
23 companies who can't pay their debts as they mature, and that
24 may well be this situation.

25 MR. SILVERSTEIN: But for the purpose of duties and

1 for the purpose of fiduciary duties under both state law and
2 under the Bankruptcy Code, they cannot take the position, as
3 they are, that they --

4 THE COURT: If they didn't pick up the phone and call
5 you on the first day you were selected as committee counsel,
6 they violated their fiduciary duty because the company is
7 insolvent and they were obligated to pick up the phone that day
8 and say come on over, let's start negotiating.

9 MR. SILVERSTEIN: I didn't say that, Your Honor.

10 THE COURT: So where's the line drawn? Why -- hasn't
11 Congress in giving the debtor exclusivity for 120 days
12 presumptively said they've got at least that long?

13 MR. SILVERSTEIN: No. I don't think that's what
14 Congress said they have at least that long. Congress said
15 we'll give you 120 days as an initial exclusivity period
16 subject to increasing that period or reducing that period for
17 cause. That's what Section 1121(d) of the Bankruptcy Code
18 says. There's no guarantee of 120 days. Typically, do they
19 get 120 days? Yes. Typically, in a normal case they do when
20 there's nothing unusual and there's no history and there's no
21 facts as we have alleged here.

22 THE COURT: But you now tell me that you're not happy
23 with the way the document flow has been going, you're
24 grudgingly -- you say they grudgingly started to give us
25 documents.

1 MR. SILVERSTEIN: As I understand, that's correct,
2 yes.

3 THE COURT: Okay. So doesn't this come down to that
4 they didn't call you?

5 MR. SILVERSTEIN: No. It doesn't come down to that
6 at all, Your Honor. I did not expect them to call me because
7 their position was -- and if you go back to the affidavits, and
8 I'm referring to the March 10th proposal, they said take this
9 or we'll shove this down your throats in bankruptcy. So when
10 you set the stage that way, I did not expect them to call me.
11 I'm not about to call them when they've said that to me because
12 I know exactly what they're doing. Precisely what they're
13 doing is management is attempting to control this company at
14 all cost. If you look at the Walsh affidavit and the Welsh
15 affidavit --

16 THE COURT: Conclusory statements by you and the
17 affiants.

18 MR. SILVERSTEIN: Certainly not. I heard your
19 comment, Your Honor, when we had the hearing --

20 THE COURT: On the telephone.

21 MR. SILVERSTEIN: -- the telephonic hearing, and that
22 was with respect to the principal Walsh affidavit. Frankly,
23 that was a little conclusory because frankly I did not really
24 want to go into the specific details of the pre-petition
25 negotiations when Mr. Lugon's affidavit attempted to detail and

1 attempted to mischaracterize the pre-petition negotiations and
2 the three proposals that were made. I felt it was incumbent
3 upon us to tell Your Honor exactly what happened. There were
4 specific details in the Walsh affidavit in support of the
5 reply. There were specific facts in the Welsh affidavit in
6 support of the reply. These are not conclusory --

7 THE COURT: Then focus on the pre-petition period
8 because I'm -- you know, you have not excited me about anything
9 that happened in the pre-petition period. Once the Chapter 11
10 petition was filed, okay, tell me -- I didn't see any non-
11 conclusory evidence that supported the rather conclusory
12 statements you make as to what they've done wrong since the
13 petition was filed. I understand that 18 months of contentious
14 pre-petition workout negotiations and you were unable to reach
15 a satisfactory conclusion and so you're here now.

16 MR. SILVERSTEIN: But that's a very kind description
17 of the 18 months, Your Honor, because the 18 months were not
18 just an unsatisfactory --

19 THE COURT: I have enough to worry about what's going
20 to happen in this case now that it's before me and will hold
21 you and the debtors' counsel to the standards that are expected
22 of them now that you're here. I'm not going to go back and --
23 it's not as if your affidavits say they were self-dealing, they
24 stole money, they did this that would justify appointment, you
25 know -- at some hearing early on you said oh, we're thinking

1 about moving for the appointment --

2 MR. SILVERSTEIN: Yes.

3 THE COURT: -- of a trustee. The next thing it was
4 terminating exclusivity. From day one, you know, with or
5 without -- I'm not saying that you don't have a basis for your
6 skepticism.

7 MR. SILVERSTEIN: Your Honor, I think that if you
8 read the facts in the Welsh affidavit and the Walsh affidavit--

9 THE COURT: I've read them more than once.

10 MR. SILVERSTEIN: I trust you have, Your Honor. It's
11 not just skepticism. I don't think one can divorce the pre-
12 petition period from the post petition period when there's been
13 nothing demonstrated to the committee as a fiduciary for all
14 the unsecured creditors of these estates that nothing
15 whatsoever has changed and the debtors' position is basically
16 the same. The debtor says in its papers that the debtor does
17 not owe fiduciary duties to creditors. They said that. Again,
18 they didn't say the debtors didn't pre-petition owe fiduciary
19 duties. They said the debtor does not owe fiduciary duties.
20 When a debtor says to a creditors committee that they do not
21 owe fiduciary duties in a Chapter 11, that is a very troubling
22 statement. I --

23 THE COURT: They didn't deny they owe fiduciary
24 duties to the estate.

25 MR. SILVERSTEIN: I understand that. I understand

1 that they didn't. You know, if they denied that, I think we
2 have, you know, [unintelligible], Your Honor. But they did
3 deny that they had fiduciary duties to creditors at a time when
4 pre-petition they were unable to pay their debts as they came
5 due. But more importantly post petition they are denying that
6 they owe fiduciary duties. As I said before and as our papers
7 I think amply demonstrate, we know the plan they will propose
8 because they told us what they will propose. All they said in
9 their papers, Your Honor, is that we have a deadline of June
10 30th to file a plan pursuant to the cash collateral order. We
11 have a deadline of July 30th to file a disclosure statement in
12 accordance with the cash collateral order, and we will do so.
13 So they basically said that we are not negotiating with
14 creditors.

15 They've also accused us of course of doing something
16 terrible in that we did not attend the Section 341 meeting. I
17 say this in jest because, you know, in this world I can't
18 remember the last time a creditors committee counsel attended a
19 341 meeting because that's the province of the U.S. Trustee.
20 We usually call the U.S. Trustee and say did anything
21 interesting happen? I say that again half joking because of
22 the absurdity of the statement by the debtors that we did not
23 attend the 341 meeting, and therefore, you know, we're not
24 negotiating with them which is an absurdity.

25 This goes, Your Honor, to good faith. The debtor --

1 although it's my burden to show Your Honor why cause exists to
2 terminate exclusivity, once we present evidence that says and
3 that shows by affidavit that the debtor is not acting in good
4 faith, it's just a little bit for the debtor to have to come
5 forward to show that they are acting in good faith. The
6 allegations in the Walsh affidavit and the allegations in the
7 Welsh affidavit were not mere conclusory allegations. They
8 detailed in response to the Lubin affidavit the facts
9 surrounding those negotiations and I cannot and they cannot
10 divorce the post petition period from the pre-petition period
11 because nothing has happened to suggest that anything has
12 changed. That's why I submit to Your Honor that the conduct
13 during the pre-petition period, that has not changed during the
14 post petition period where there's been no interaction and no
15 engagement among the debtor and the creditors. That's why I
16 suggest to you that the lack of good faith that existed pre-
17 petition continues post petition.

18 But again, if I can continue with the argument, Your
19 Honor? What would happen here and what's the significance of
20 termination of exclusivity? Management would then still have
21 the right to pursue their plan that keeps them in control. If
22 you look at the March 28th offer that's in the Welsh affidavit,
23 that was an offer that was made only to Jeffries. It was not
24 made to the ad hoc group.

25 THE COURT: I read it. I read it.

1 MR. SILVERSTEIN: That basically was predicated on
2 the corporate governance issues where for two years they would
3 have a right to essentially buy it back or keep in control.
4 It's all about control, Your Honor.

5 THE COURT: What's wrong with that proposal? It
6 wasn't acceptable but --

7 MR. SILVERSTEIN: Because it --

8 THE COURT: -- what was wrong with it?

9 MR. SILVERSTEIN: Because it didn't pay creditors in
10 full when creditors were entitled --

11 THE COURT: Okay. So Jeffries didn't agree with the
12 proposal that was made. They didn't accept it.

13 MR. SILVERSTEIN: But Your Honor, once the company
14 files Chapter 11, the machinations and the proposals that they
15 could make pre-petition are off - it's a different universe.
16 They have fiduciary duties to creditors under all standards,
17 both U.S. state law standards and under Chapter 11.

18 THE COURT: Other than picking up the phone and
19 calling you, what have they done in the post -- since the
20 petition was --

21 MR. SILVERSTEIN: Nothing in respect of negotiation.
22 A fundamental precept of exclusivity and a fundamental precept
23 of continuation of exclusivity is that the debtor has shown
24 something in the way of negotiating a plan.

25 THE COURT: So on what day after the filing of the

1 petition were they obligated to call you and say let's sit
2 down?

3 MR. SILVERSTEIN: No particular day, Your Honor, but
4 they haven't done it. So the answer is to date it hasn't
5 happened. It's not just a phone call. Phone calls are empty,
6 phone calls are easy, phone calls are words. It would have
7 been nice to get a phone call but there's been no engagement
8 with the statutory representative of creditors, and that is one
9 of the grounds to terminate exclusivity. It's the breach of
10 fiduciary duty pre-petition that's not abated post petition
11 because nothing's changed. Had they done anything
12 affirmatively post petition --

13 THE COURT: I didn't see anything in the Walsh
14 affidavit that persuaded me that even pre-petition there was a
15 breach of fiduciary duty. What the affidavit showed was a real
16 lack of agreement about how to work this out. But that doesn't
17 equate to breach of fiduciary duty.

18 MR. SILVERSTEIN: Let's accept that for a second
19 there's no breach of fiduciary duty. There's certainly a lack
20 of good faith in the negotiations because each of the
21 proposals --

22 THE COURT: That was Mr. Walsh's conclusion.

23 MR. SILVERSTEIN: And Mr. Welsh's conclusion, and the
24 conclusion --

25 THE COURT: Fine. Walsh and Welsh thought it was bad

1 faith, and they say it's good faith. They say, you know,
2 okay -- go ahead.

3 MR. SILVERSTEIN: Mr. Walsh, Mr. Welsh, and several
4 other sophisticated holders of notes who were on the ad hoc
5 committee all are of the same view and they were there. What
6 they said, and what I think the documents demonstrate, is that
7 what the debtors were doing was something other than attempting
8 to repay creditors.

9 THE COURT: It clearly --

10 MR. SILVERSTEIN: It was fundamentally a stall.

11 THE COURT: It clearly shows a very unsuccessful pre-
12 petition workout.

13 MR. SILVERSTEIN: Without question. Without question
14 it shows an unsuccessful pre-petition workout. But I'm
15 submitting to Your Honor --

16 THE COURT: That often leads to where you are now.

17 MR. SILVERSTEIN: Correct. That's correct. There is
18 nothing unusual about an unsuccessful workout. It happens
19 every day. But the facts of that unsuccessful workout are such
20 that given the debtor continued exclusivity when there's no
21 longer a -- where there's not a level playing field is
22 prejudicial to creditors.

23 What I was saying a moment ago is that if exclusivity
24 is terminated, management can still pursue their own plan.
25 They can still try to convince Your Honor various things that

1 would enable them to keep control of the company which we
2 believe will be unsuccessful. But at the same time, Your
3 Honor, creditors would be able to pursue their own plan so that
4 there's a level playing field. Exclusivity was never intended
5 to allow management of the debtor or to allow a debtor to
6 basically push for a plan on behalf of 70% of the equity --

7 THE COURT: Unless or until exclusivity is
8 terminated, it's not a level playing field, and that's the way
9 the code is drafted.

10 MR. SILVERSTEIN: Correct. That's the way the code
11 is drafted but the code is drafted to say that when there's
12 cause, and cause is undefined, but when there's cause you can
13 create a level playing field if it fosters the reorganization
14 process, if it fosters speed, which we believe it will foster,
15 and if it fosters a reorganization process as opposed to the
16 debtor or management acting -- what this is akin to --

17 THE COURT: So hypothetically if you and your clients
18 were being intransigent and were holding out for what you
19 wanted, that would mean automatically that exclusivity should
20 be terminated because you're not making progress in
21 negotiations.

22 MR. SILVERSTEIN: No. Who am I on that question?

23 THE COURT: You're counsel for the ad hoc committee
24 or now you're counsel for the creditors committee.

25 MR. SILVERSTEIN: Okay. I don't have exclusivity.

1 THE COURT: But the point is let's assume you sat
2 down and you're being absolutely intransigent. Here's the only
3 thing we're willing to accept. Maybe we'll mess with it in the
4 edges, but we're not willing to do anything like what you were
5 talking about in the pre-petition period and we're not prepared
6 to talk about anything else, so that's it. Does that mean you
7 get to file a motion to terminate exclusivity and have
8 exclusivity lifted?

9 MR. SILVERSTEIN: Not necessarily and not on that
10 fact alone. Those aren't the facts. If I'm being intransigent
11 and I basically blow off the negotiation --

12 THE COURT: It's all in the eyes of the beholder, Mr.
13 Silverstein.

14 MR. SILVERSTEIN: Everything, Your Honor, everything,
15 everything is in the eyes of the beholder. That's why you have
16 evidence and that's why you have to decide what's credible and
17 what's not credible, and what's believable.

18 THE COURT: Well, first I have to decide what the
19 evidentiary showing that you made at least in the initial
20 affidavit because if I don't take into account the Lubin
21 affidavit, I'm not sure I take into account your reply
22 affidavit. That was part of what we talked about on the phone.
23 Have you in your moving papers established a prima facie
24 showing that would be required to lift, terminate exclusivity?
25 If I think you have and there are disputed issues of material

1 fact and I want to consider to the Lupin affidavit, we'll have
2 an evidentiary hearing. But while Gotshal certainly took the
3 position, even assuming that everything that's in that
4 affidavit is true, they haven't established the legal basis to
5 terminate exclusivity.

6 MR. SILVERSTEIN: On that theory that they didn't owe
7 fiduciary duties pre-petition and they don't owe fiduciary
8 duties post petition --

9 THE COURT: I don't think it hinged on whether they
10 did or didn't owe pre-petition fiduciary duties.

11 MR. SILVERSTEIN: Well, I think it did hinge on --

12 THE COURT: Any last points you want to make?

13 MR. SILVERSTEIN: Yeah, I'd like to make a couple.

14 THE COURT: Let's make them.

15 MR. SILVERSTEIN: Your Honor, as stated in the Walsh
16 affidavit, the debtors have already told the committee what
17 their plan will be. It's the March 10th proposal.

18 THE COURT: They haven't told the creditors committee
19 that.

20 MR. SILVERSTEIN: Yes. They've told --

21 THE COURT: You haven't had any discussion --

22 MR. SILVERSTEIN: They've told the ad hoc committee,
23 okay? The ad hoc committee has told the creditors committee.
24 So effectively they've told the creditors committee. Okay?
25 They've told them, again, pre-petition, they said take it or

1 we'll force it on you at a Chapter 11 case. So we know what
2 the plan will be. They haven't shown us anything to the
3 contrary and they have an obligation to show us something to
4 the contrary to have a continuation of exclusivity.

5 Your Honor, there's one class of unsecured creditors
6 excluding consigners. The pre-petition group dominates that
7 class. So the debtor cannot confirm a plan over the objection
8 of that class. That is just a fact in this case as we see it.
9 It just is staggering that the debtor and the debtor's
10 management can take the position that essentially what the
11 debtor really is is an equity committee. The debtor's acting
12 as an equity committee. Your Honor, an equity committee
13 doesn't have exclusivity to the exclusion of creditors. But
14 that is effectively in essence what's happening here and what
15 this case is about.

16 That's why this case is different. When 70% of the
17 stock is owned by management and the insider group and
18 management and the insider group has shown for an 18 month
19 period that they're basically negotiating for -- not
20 negotiating, but they're basically acting for themselves and
21 for their own interests and nothing whatsoever in the post
22 petition period has changed, and nothing whatsoever in the post
23 petition period has been shown to suggest that they've seen --
24 that they understand that their duties are different, because
25 they haven't, that's when it's appropriate to level the playing

1 field so that equity, i.e. stockholders and creditors can each
2 be pursuing their own respective plans.

3 Again, I don't need to talk about [unintelligible].
4 I think we've talked about that in our papers. I think their
5 alliance was misplaced.

6 THE COURT: Well, okay, go ahead.

7 MR. SILVERSTEIN: I think that the test for
8 insolvency which, you know, again, if the debtors are now going
9 to say we recognize that we're fiduciaries to creditors post
10 petition that ought to be interesting because they didn't say
11 that and their papers flatly contradict that because what it
12 does is pretty clear. There was no reference to the pre-
13 petition period.

14 You know, the Bowman case, 181 at 843, when referring
15 to a debtor's fiduciary duty was interesting. I mean there's
16 lots of cases that have nice language, but that one
17 particularly struck me as being relevant here in terms of the
18 legal concepts. It said that such duties include a duty of
19 care, a duty of loyalty, a duty of impartiality, and a duty to
20 avoid self-dealing. Everything we've seen in the 18 months
21 prior to the petition and everything that we've seen post
22 petition --

23 THE COURT: Are you accusing them of self-dealing?

24 MR. SILVERSTEIN: I'm suggesting that management is
25 acting on their own behalf. If that's self-dealing --

1 THE COURT: Are you accusing them of self-dealing?

2 MR. SILVERSTEIN: I'm suggesting that --

3 THE COURT: Tell me what self --

4 MR. SILVERSTEIN: -- they're not acting in good
5 faith.

6 THE COURT: Tell me what the self-dealing has been.

7 MR. SILVERSTEIN: Self-dealing is that management is
8 acting as stockholders to protect and to enhance --

9 THE COURT: Do you have a case that says that that's
10 self-dealing?

11 MR. SILVERSTEIN: I don't have a case that says it's
12 self-dealing because if I was accusing them of self-dealing I'd
13 be moving for a trustee right now. I'm not moving for a
14 trustee, Your Honor. I'm moving to terminate exclusivity so I
15 can level the playing field so that creditors can be
16 represented in a plan process hearing.

17 THE COURT: You used the term self-dealing. That has
18 a very specific legal connotation to me and since you've used
19 it I want to know whether you're accusing the debtor's
20 management of self-dealing.

21 MR. SILVERSTEIN: I don't know what connotation it
22 has to Your Honor so, you know, I can't really respond.

23 THE COURT: Well, then don't use it if you don't know
24 what you're talking about.

25 MR. SILVERSTEIN: Well, I'm quoting a case, Your

1 Honor.

2 THE COURT: Are you? Which case?

3 MR. SILVERSTEIN: The Bowman case.

4 THE COURT: What was the self-dealing in that case?

5 MR. SILVERSTEIN: I don't know what the self-dealing
6 in that case was because I'm not dealing with the facts in
7 Bowman. What I'm dealing with, Your Honor, is when
8 management --

9 THE COURT: Did Bowman involve self-dealing?

10 MR. SILVERSTEIN: Your Honor, I don't have the facts
11 of Bowman off the top of my head.

12 THE COURT: All right. But --

13 MR. SILVERSTEIN: What I'm saying to Your Honor is
14 that when management is acting as a 70% stockholder, when
15 management is not fulfilling its fiduciary obligations to
16 creditors, there's cause to terminate exclusivity.

17 THE COURT: Okay. Tell me specifically how
18 management has failed to fulfill its fiduciary duty to
19 creditors since the filing of the Chapter 11 petition.

20 MR. SILVERSTEIN: Because they've essentially through
21 their silence and through inactivity have continued the pattern
22 during the 18 months prior to the petition date. The pattern
23 during the 18 months prior to the petition date --

24 THE COURT: Don't tell me about the 18 months. You
25 say they've breached their fiduciary duty by silence since the

1 filing of the petition. Is there any other way in which you
2 allege that management has breached its fiduciary duty since
3 the filing of the petition?

4 MR. SILVERSTEIN: Just by a continuation of their
5 conduct pre-petition.

6 THE COURT: Which specific conduct have they
7 continued since the filing of the petition which you say is a
8 breach of management's fiduciary duty?

9 MR. SILVERSTEIN: The conduct is that based on what
10 management told us pre-petition, they are continuing to attempt
11 to further a plan or to foster a plan --

12 THE COURT: What evidence do you have that supports
13 that? You said you've had no communication with them.

14 MR. SILVERSTEIN: Because there's no evidence to the
15 contrary and their conduct is --

16 THE COURT: I didn't think that, you know, no
17 evidence to the contrary satisfies your evidentiary burden.

18 MR. SILVERSTEIN: Your Honor, I don't know that I
19 have an evidentiary burden today to demonstrate with certainty
20 that they're breaching their fiduciary duty. I think cause and
21 fiduciary duty are not the same standard.

22 THE COURT: Okay. So you're relying --

23 MR. SILVERSTEIN: Fiduciary duty is indicia of lack
24 of good faith.

25 THE COURT: So you're not relying on breach of

1 fiduciary duty to establish cause?

2 MR. SILVERSTEIN: I am relying on a breach of
3 fiduciary duty in the context of showing that their conduct has
4 not been in good faith pre-petition and their conduct has not
5 been in good faith post petition.

6 THE COURT: Anything else?

7 MR. SILVERSTEIN: No, Your Honor, not at the moment.

8 THE COURT: All right. Thank you.

9 MR. SILVERSTEIN: Thank you.

10 THE COURT: Why didn't you pick up the phone and call
11 Mr. Silverstein?

12 MR. MARCUS: Your Honor, what Mr. Silverstein had
13 said I actually disagree with. I had a call --

14 THE COURT: That was -- okay.

15 MR. MARCUS: I did is the answer. We did. On Monday
16 I had a call with my partner --

17 THE COURT: Monday of this week?

18 MR. MARCUS: This Monday of this week.

19 THE COURT: Okay.

20 MR. MARCUS: I don't know if a call was ever made
21 before that.

22 THE COURT: Why didn't somebody pick up the phone and
23 call Mr. Silverstein or why didn't you talk to him outside in
24 the hallway after one of the hearings? Why the Monday of the
25 Wednesday hearing did you finally pick up the phone and call?

1 MR. MARCUS: Your Honor, I think the answer to that
2 is I'm going to agree with something Mr. Silverstein said and
3 what he said was a call would have been nice but it's more than
4 that. It's more than just a call. I agree with that because I
5 don't know if Mr. Krasnow did or anybody else at Weil Gotshal
6 specifically said, until this Monday, would you like to get
7 together for a meeting? We can facilitate that. However, I
8 don't know, maybe five or ten days after the committee was
9 appointed we began negotiations with the creditors committee
10 for a confidentiality agreement for SRR to begin receiving
11 information. I don't think there's any reason to delve into
12 the specifics of the information flow. Mr. Silverstein has
13 made the point several times that it's been slow, it's been
14 arduous.

15 THE COURT: Did you enter into a confidentiality --

16 MR. MARCUS: We did enter into a confidentiality
17 agreement with them, Your Honor. In fact, we began delivering
18 information even in advance of that confidentiality agreement
19 with the agreement that it would be covered by the subsequent
20 confidentiality --

21 THE COURT: So I'm intrigued. You said you called --
22 you tried to reach Mr. Silverstein on Monday of this week?

23 MR. MARCUS: No. My partner Adam Stroccheck [Ph.] and
24 I had a call with I believe Mr. Silverstein's partner, Mr.
25 Bracht, if I'm pronouncing that correctly --

1 THE COURT: About beginning negotiations?

2 MR. MARCUS: No, no, actually we were negotiating --
3 well, where I was going with the more than a phone call is the
4 delivery of information which I disagree. Information has been
5 flowing. They have access to an online data room that has over
6 4,000 pages of documents in it. We have delivered to date
7 7,224 pages of documents. That's 432 documents pursuant to a
8 huge document request that they gave us I believe even before
9 the confidentiality agreement was entered into. Mr.
10 Silverstein's papers and Mr. Walsh's affidavit say we still
11 haven't gotten, this is on June 10th, we still haven't gotten
12 the indications of interest that were delivered to the company
13 in the pre-petition period. Not true. Those were delivered by
14 WY Campbell to SRR on June 5th, all of those. So they had
15 them.

16 MR. SILVERSTEIN: That's not true.

17 MR. MARCUS: They had them when all of this stuff was
18 filed. That's my understanding. So as far as I'm concerned,
19 information --

20 THE COURT: Mr. Silverstein, please be quiet over
21 there.

22 MR. SILVERSTEIN: I'm sorry, Your Honor.

23 MR. MARCUS: Information has been flowing quite well.

24 THE COURT: Let me just -- I want to make clear --

25 MR. SILVERSTEIN: I apologize, Your Honor.

1 THE COURT: -- I do not permit sota voce comments
2 when other counsel are arguing.

3 MR. SILVERSTEIN: I apologize, Your Honor.

4 THE COURT: Go ahead, Mr. Marcus.

5 MR. MARCUS: So Your Honor, it is more than that. It
6 is more than just a phone call. It's the continued delivery of
7 information. My --

8 THE COURT: Address the issue of whether the debtor's
9 management owes a fiduciary duty and to who since the filing of
10 the petition.

11 MR. MARCUS: I'm sorry, owes a fiduciary duty and to
12 who?

13 THE COURT: Yes, because Mr. Silverstein points out
14 to the place in your brief where you say -- unclear whether
15 you're talking -- could well be talking about the current post
16 petition period. Does the debtor in possession and its
17 management owe a fiduciary duty and to whom?

18 MR. MARCUS: The debtor in possession and management
19 certainly owes fiduciary duties post filing.

20 THE COURT: To who?

21 MR. MARCUS: We owe fiduciary duties to the estate.
22 I don't believe that we have direct fiduciary duties to
23 creditors. Now, I think you have to layer on top of that some
24 facts and circumstances here. Mr. Silverstein's argument is,
25 and he said very clearly, I wrote it down, all of the offers

1 that management has made to creditors he said we didn't accept
2 it because quote, "It didn't pay creditors in full when
3 creditors are entitled." That to me means that the company is
4 solvent.

5 THE COURT: But I made -- you know, maybe there's a
6 repaid in full plus a penny. I don't know what the situation--
7 I'm really not moved by either side's explication of the failed
8 pre-petition negotiations. Okay. So Mr. Silverstein, I'll say
9 that to you as well. What is your view of -- you say that
10 management owes a fiduciary duty to the estate. What does that
11 mean in terms of the creditors in your view?

12 MR. MARCUS: That means that I certainly agree that
13 management has the duty to preserve the value of the estate, to
14 maximize the value of the estate for the benefit of creditors.
15 The management has a duty to maximize the value of the estate
16 for all parties. If management proposes a plan that pays
17 creditors in full, which we believe we're going to propose,
18 then I believe that the company has discharged its duties.
19 Even if you assume that the company is insolvent and management
20 has direct fiduciary duties to creditors, I think as Your Honor
21 pointed out, there's no evidence that any of those duties have
22 been breached. We believe that proposing a plan that pays
23 creditors in full is about as good a discharge of that duty as
24 one can possibly be.

25 THE COURT: Does the management owe a fiduciary duty

1 to negotiate the potential terms of a plan during the period of
2 exclusivity?

3 MR. MARCUS: Maybe yes, maybe no. I mean I think the
4 answer to the question as a general matter is absolutely. I
5 think a debtor in possession --

6 THE COURT: The cases seem to say that one of the
7 things expected of management, and I would assume it's their
8 duty therefore, during the period of exclusivity is to seek to
9 negotiate with the creditors.

10 MR. MARCUS: Actually, Your Honor, I take back my
11 answer and let me modify it. What I was referring to was the
12 cases, and Your Honor referred to this when Mr. Silverstein was
13 up here, that if the creditors just sit back and they're
14 calcitrant and they say we're not going to accept anything that
15 they manufactured cause for termination of an exclusivity. I
16 think the answer to that is no. I think Judge Sigmund makes
17 that absolutely clear in the Lehigh Valley case.

18 THE COURT: But the counter to that is that if
19 management just sits back and says take it or leave it, this is
20 the deal, has the management fulfilled its obligations to --
21 well, do you agree that management has an obligation to
22 endeavor to negotiate with the creditor constituencies, here
23 really just one, one constituency, during the exclusivity
24 period?

25 MR. MARCUS: I think management has an obligation to

1 continue to negotiate with creditors. I think that as much
2 as --

3 THE COURT: When you say continue, that assumes a
4 start. Has it started here?

5 MR. MARCUS: I don't think it really has.

6 THE COURT: So when is it going to start, Mr. Marcus?

7 MR. MARCUS: Well, in the call that I had on Monday
8 the question was would you like us to facilitate a meeting --

9 THE COURT: I don't really care so much about the
10 call. Tell me.

11 MR. MARCUS: My understanding is the creditors
12 committee would like more information before they're ready to
13 sit down with the debtors. The debtors are ready today to sit
14 down with the creditors and I'll go on record and say we'll
15 reach out and call after this hearing if that's what it takes
16 to get it started, but the debtors are ready to start today to
17 discuss. Now, there are underlying documents that need to be
18 completed; objections, valuations, financial documents that we
19 haven't finished yet.

20 THE COURT: They need to be completed but they don't
21 necessarily need to be completed before you commence your
22 discussions with the committee.

23 MR. MARCUS: I agree.

24 THE COURT: I mean -- all right, you agree with that.

25 MR. MARCUS: I agree with that. I don't think that

1 we need to finalize and I have in many cases commenced
2 negotiations with the creditors committee before --

3 THE COURT: So why has that happened here?

4 MR. MARCUS: My understanding is the creditors
5 committee is waiting for more information before that process
6 begins.

7 THE COURT: What information do you understand that
8 they're waiting to receive?

9 MR. MARCUS: Off the top of my head the only I think
10 pertinent information that hasn't been provided yet would be
11 the financials, underlying disclosure statement, and the plan
12 which I don't think are ready to go to the committee yet.
13 Perhaps the schedules which my understanding is they'll be
14 filed on Friday. Those might play into the equation as well.
15 It's not my experience that all of that information is
16 delivered to be digested prior to the start of the
17 negotiations.

18 THE COURT: I pressed Mr. Silverstein pretty hard
19 about why he didn't pick up the phone and call you or Mr.
20 Krasnow. Why didn't you pick up the phone and call him before
21 Monday of this week? Mr. Krasnow, you want to answer that?

22 MR. KRASNOW: Your Honor, I think just since I -- Mr.
23 Marcus has been involved in other matters --

24 THE COURT: Right.

25 MR. KRASNOW: -- so I probably have been a little

1 more involved for the past two months. Your Honor, I did not
2 pick up the phone. I'm not going to deny that. Certainly it's
3 been my experience over the past few decades that I've been
4 practicing in this area that usually at the beginning of the
5 case there is communication between counsel for the committee
6 and counsel for the debtor regarding protocols and starting
7 discussions and information flow. Usually that occurs with
8 counsel to the committee picking up the phone. But putting
9 aside who picks up the phone first, indeed and to my
10 recollection the first person who picked up the phone was in
11 fact Mr. Silverstein. Mr. Silverstein contacted me and
12 inquired of me not when will we have a meeting but rather he
13 advised me as to who the committee had selected as their
14 financial advisor and had requested of the company whether or
15 not even before papers had been filed to retain that financial
16 advisor whether or not the debtors would be prepared to provide
17 information that might be confidential in nature and indeed
18 enter into a confidentiality agreement. I perhaps was a little
19 ahead of my client but I wasn't as it turned out and said of
20 course.

21 Indeed our initial attention was focused on preparing
22 a confidentiality agreement, negotiating that agreement which
23 frankly did not take that long, and then proffering that
24 agreement. Indeed, I may be off a day or so, even before an
25 application had been filed seeking authority for the committee

1 to retain SRR, I believe we entered into the agreement. It
2 might have been on the day the application was filed. It might
3 have been the day thereafter.

4 So in fact one of those elements of what typically
5 occurs in a Chapter 11 at the outset of a Chapter 11 occurred
6 which is trying to get in place a mechanism where there could
7 be information provided to the committee so that they would
8 have financial information and other information that would be
9 relevant to their discharging their fiduciary duties and to
10 facilitate whatever meetings might take place.

11 THE COURT: So is the plan you're going to propose as
12 Mr. Silverstein believes going to be identical to one of the
13 rejected workout term sheets?

14 MR. KRASNOW: It will be identical in the following
15 respect. The core of the dispute that existed pre-Chapter 11,
16 and I think this is evident when you read all the affidavits
17 and declarations whether it's Mr. Lubin's, Mr. Walsh's, or Mr.
18 Welsh's -- I was worried that I would confuse the two -- is
19 that there was a fundamental disagreement between the parties
20 with respect to valuation. That is a key element of a plan.
21 The company, its board of directors -- and I might add, Your
22 Honor, there was a board of directors that is more than just
23 two individuals. There are five members on the board. The
24 board of directors believed based on information that had been
25 provided to them and their own individual analysis, they are

1 sophisticated parties, that Lexington, the debtors, are solvent
2 and that what flows from that are two things. One, that it's
3 appropriate for there to be a return to equity and that any
4 restructure outside of 11 but particularly in Chapter 11 must
5 provide for creditors to be paid in full.

6 THE COURT: Can I ask Mr. --

7 MR. KRASNOW: I'm sorry, Your Honor.

8 THE COURT: I'll let you go ahead and answer but are
9 you telling me that what you're going to propose is identical
10 to what you previously proposed and was rejected?

11 MR. KRASNOW: It is going to be a plan that will
12 provide for two things.

13 THE COURT: Because if it is, you better do it sooner
14 and let's get on with it.

15 MR. KRASNOW: Well, I'll answer the question, Your
16 Honor, and then I'll go to timing and that timing doesn't
17 preclude and shouldn't preclude and will not preclude on our
18 side an attempt to have negotiations. But I can tell you --

19 THE COURT: But if what you're going to give them is
20 the same as they got before, you may as well start the
21 negotiations today and see what happens --

22 MR. KRASNOW: Well Your Honor --

23 THE COURT: -- than wait to the very last day of
24 exclusivity and give them something that you know they're going
25 to reject.

1 MR. KRASNOW: Your Honor, a couple of observations.
2 The plan will provide for return to equity and that's because
3 we have one view of value. They may or may not have a
4 different view. Presumably they have a different view of
5 value. In terms of timing, as has been said multiple times, as
6 a result of the requirements of the final cash collateral order
7 the debtor is required to file a plan by the end of this month.
8 So we will be filing a plan by the end of this month. We, as
9 Mr. Marcus says, we are ready to sit down and have discussions
10 with the committee with respect to the plan that will be filed
11 and irrespective of the outcome of those discussions we will be
12 ready, willing, and frankly desirous of having negotiations
13 about the plan after the, I'll call it the June 30th plan is
14 filed because from our perspective --

15 THE COURT: Why does it have to wait until then?

16 MR. KRASNOW: Your Honor --

17 THE COURT: It sounds like you know what it's going
18 to be.

19 MR. KRASNOW: Your Honor, actually we are still
20 having internal discussions with respect to the components of
21 the plan. So in that respect it's a little premature. I
22 realize June 30th is close. But the reason I made my point is
23 that we do not view the filing of the plan, whether it were to
24 occur today or June 30th, well within the 120 days, as an event
25 which triggers people folding their arms, at least on our side,

1 and saying we're unprepared to have discussions and hopefully
2 negotiations with the creditors committee because if we had our
3 druthers at the end of the day we would rather have a
4 consensual plan rather than a nonconsensual plan.

5 THE COURT: Do you agree with Mr. Silverstein that
6 you can't confirm a plan over the objections of this only
7 unsecured creditors class?

8 MR. KRASNOW: Absolutely not. I'm sure you're not
9 surprised at that statement.

10 THE COURT: I'm not. I just wanted to -- since Mr.
11 Silverstein was so definitive in his response I wanted to --

12 MR. KRASNOW: Your Honor, Your Honor made an
13 observation and I'll second, and that is while Mr. Silverstein
14 denies it, at least our view of their motion was sure they were
15 trying to terminate exclusivity within the first 120 days, and
16 I'm going to defer to Mr. Marcus to really articulate our view
17 of what standards have to be shown in order to terminate
18 exclusivity within the initial 120 days, something Mr.
19 Silverstein has conveniently ignored in our view addressing
20 which was really our first point in our brief. We don't
21 believe that he has demonstrated anything close to the
22 standards that the few cases that have addressed termination
23 within the 120 days have indicated the appropriate standards.
24 But again, I'll defer to Mr. Marcus on that.

25 But what this motion is is a somewhat obvious attempt

1 from our perspective of trying to educate the Court as to what
2 the Court will see --

3 THE COURT: Oh, this has been going on since day one
4 of the case and I don't particularly appreciate it.

5 MR. KRASNOW: Your Honor, and I think that's a very
6 good point and I'd like to focus on that for a moment.

7 THE COURT: You don't need to focus on it.

8 MR. KRASNOW: Then I won't. We are not going to
9 propose a plan --

10 THE COURT: You know, there's all this jockeying
11 going on. You know, get on with the --

12 MR. KRASNOW: Your Honor, we're not going to propose
13 a plan that we don't believe has a legal basis that this Court
14 could rely upon to confirm the plan. So we disagree with Mr.
15 Silverstein's observations. Whether they support the plan or
16 not, we believe we will be submitting a plan that creditors
17 will be able to vote on and hopefully we have the note holders
18 and the creditors committee's consent to the plan. But if not,
19 Your Honor will ultimately determine the issues relating to
20 valuation and classification and any other issues that may be
21 pertinent to that.

22 THE COURT: All right. Here's what I'd like to do.
23 I want to take a ten minute recess. Actually, we'll take a 12
24 minute recess, a quarter after 3. In that recess, Mr. Marcus,
25 Mr. Krasnow, Mr. Silverstein, when I come back on the bench

1 you're going to tell me what day you're going to meet to begin
2 negotiations. I can tell you I'm going to take this matter
3 under advisement today. I still haven't decided whether there
4 are material factual issues that are in dispute such that an
5 evidentiary hearing would be required. I need to spend some
6 more time thinking about that. But that in the meantime is not
7 going to give anybody a pass from -- I want to know what your
8 schedule is going forward. So I'll be back on the bench at
9 quarter after 3 and you'll tell me what that is and then we'll
10 figure out how we're going from here.

11 MR. SILVERSTEIN: Very well, Your Honor.

12 [Off the record.]

13 THE COURT: Please be seated. Mr. Krasnow, you want
14 to enlighten me?

15 MR. KRASNOW: The negotiations were successful, Your
16 Honor.

17 THE COURT: You've been able to negotiate a meeting?

18 MR. KRASNOW: We've negotiated a meeting which --

19 MR. SILVERSTEIN: Not totally successful you ought to
20 tell him.

21 MR. KRASNOW: A week from Thursday, June 19th. Just
22 for Your Honor's benefit we couldn't do anything earlier than
23 next week -- oh, never mind, Your Honor. So we will have a
24 meeting --

25 THE COURT: Where are you meeting?

1 MR. SILVERSTEIN: We don't know when yet. So it
2 wasn't a complete negotiation, Your Honor, if I might add.

3 MR. KRASNOW: Not everybody has their Blackberry or
4 their paper calendar so I can't tell you exactly what time.
5 Presumably it will be either Mr. Silverstein's office or our
6 office.

7 THE COURT: Okay.

8 MR. KRASNOW: In Manhattan.

9 MR. SILVERSTEIN: Whoever has the best air
10 conditioning is what I think it will be.

11 THE COURT: Fine. Are there information requests
12 that need to be satisfied before then?

13 MR. KRASNOW: The --

14 THE COURT: I'll give you a chance, Mr. Silverstein.

15 MR. SILVERSTEIN: Okay.

16 MR. KRASNOW: I don't want to speak for Mr.
17 Silverstein as to --

18 THE COURT: Let me stop you.

19 MR. KRASNOW: But I may have -- we would anticipate
20 prior to that meeting providing them with an outline of certain
21 of the terms of a plan that we are contemplating. It will not
22 be a definitive document because it continues to be a work in
23 process and there are certain particular issues we need to
24 focus on and have not been able to fully --

25 THE COURT: Let me suggest this. Mr. Silverstein, if

1 there's information -- obviously you want to see this outline
2 of the plan, but if there's additional information -- the
3 schedule is going to be filed on Friday?

4 MR. KRASNOW: The schedules will be filed by no later
5 than Friday. There is certain information which is critical to
6 finalizing the plan which we discussed briefly that relate to
7 such things as projections which are not complete and probably
8 will not be complete by Thursday of next week, but that isn't
9 to say that we can't begin the discussions, Your Honor, and
10 that's --

11 THE COURT: Well, if you file your schedules by
12 Friday it would seem to me that on Monday or Tuesday of next
13 week you want to have a telephone conversation and you want to
14 discuss whether there's other information that would be helpful
15 to have before the Thursday meeting where you're able to
16 accommodate those requests.

17 MR. KRASNOW: That's fine.

18 MR. SILVERSTEIN: Monday sounds perfect.

19 THE COURT: So try and make the Thursday the 19th
20 meeting as useful as possible.

21 MR. KRASNOW: Without question, Your Honor.

22 THE COURT: Okay.

23 MR. KRASNOW: We will respond to all reasonable
24 requests. Would Your Honor care to hear one aspect of our
25 argument, maybe not, Your Honor, as to --

1 THE COURT: Only if -- you know, I don't want this to
2 become more contentious than it already is.

3 MR. KRASNOW: It's simply an observation, Your Honor,
4 and --

5 THE COURT: Go ahead. I'm sure Mr. Silverstein wants
6 to respond as well.

7 MR. KRASNOW: -- rapidly switching back and forth --
8 very brief, Your Honor. We believe that there are very few
9 cases that have been decided in the context of a motion to
10 terminate exclusivity within the initial 120 days. We cite
11 them in our brief. None of those cases were really addressed
12 in that context by Mr. Silverstein. There's the Lehigh case,
13 there's the Texaco case, there was, if I'm getting the name
14 correct, the Geriatrics case, and what all of those cases in
15 substance say is that whatever basically issues, factors would
16 apply in considering a motion to extend exclusivity beyond the
17 initial 120 days or a motion to terminate the exclusive
18 periods, they simply don't apply within the initial 120 days
19 because Congress intended the debtor simply has the 120 days.
20 Those factors, those limited factors which those Courts
21 indicate --

22 THE COURT: I'm mindful of the case law.

23 MR. KRASNOW: Very well, Your Honor.

24 THE COURT: Let me just ask this. This tentative
25 meeting scheduled for the 19th, obviously the lawyers will be

1 present. Have you discussed which of the principals will be
2 present?

3 MR. KRASNOW: One of the reasons we suggested that
4 date is because the principals, the debtors the beginning of
5 next week are going to be traveling with the financial advisor
6 to the committee to some of the debtor's facilities.

7 THE COURT: Okay.

8 MR. KRASNOW: So I believe both members of senior
9 management will be --

10 THE COURT: They will be present on the 19th?

11 MR. KRASNOW: They will be -- one or both of them
12 will be present. We've been advised by Mr. Silverstein that
13 they will at this meeting. I gather most of the, but not all
14 of the committee members will be participating by phone.

15 MR. SILVERSTEIN: The committee will be well
16 represented in person or by phone.

17 THE COURT: I'm not opposed to having people
18 participate by phone. Having people, having some
19 representation face to face really does make a difference.

20 MR. SILVERSTEIN: Your Honor, we agree and that will
21 happen.

22 THE COURT: Okay. Do we have other dates when you're
23 back in front of me?

24 MR. KRASNOW: I'm sorry, Your Honor?

25 THE COURT: Do we have any other dates when you're in

1 front of me again?

2 MR. SILVERSTEIN: I don't recall.

3 MR. KRASNOW: I don't believe so, Your Honor.

4 THE COURT: I'd like to have a telephone status
5 conference on the afternoon of Tuesday, June 24th.

6 MR. SILVERSTEIN: Your Honor, I have a confirmation
7 hearing in Fort Worth on that day. Is there any way we can do
8 it --

9 THE COURT: Absolutely, absolutely.

10 MR. SILVERSTEIN: Wednesday would be good.

11 MR. KRASNOW: Wednesday, that would be the 25th?

12 MR. SILVERSTEIN: Yeah, that will be perfect.

13 THE COURT: If we could do it, because I have a
14 calendar both in the morning and in the afternoon on the 25th,
15 but if we can do it at say 5:00 on the 25th.

16 MR. SILVERSTEIN: That would work for us.

17 THE COURT: All right. One of you arrange a
18 conference calling number and just advise my chambers about it.
19 It'll be short but I'd like to have a status report. We're
20 working on this motion, the motion to terminate exclusivity but
21 I'd like to hear where things stand as we work on it.

22 MR. KRASNOW: Very well.

23 THE COURT: Okay. Anything else for today?

24 MR. KRASNOW: No, Your Honor.

25 MR. SILVERSTEIN: No, Your Honor.

1 THE COURT: Thank you. All right. We're adjourned.

2 MR. KRASNOW: Thank you, Your Honor.

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1 I certify that the foregoing is a court transcript from an
2 electronic sound recording of the proceedings in the above-
3 entitled matter.

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6 _____
Mary Greco

7 Dated: June 13, 2008
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